



Determination 2015/014

Regarding the issue of a dangerous building notice for a house at 153 White Swan Road, Mount Roskill, Auckland

1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are:

- the owner of the house, Madhava Limited (“the applicant”), represented by a lawyer (“the applicant’s lawyer”)
- Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

I have included the New Zealand Fire Service (“the NZFS”) by way of consultation under section 170 of the Act. The NZFS are acting through legal advisers.

1.3 This determination arises from the decision of the authority to issue a dangerous building notice for a multi-unit dwelling (“the building”) under section 124 of the Act. The authority is concerned that the building does not have adequate fire separation between the alleged three residential units in the same dwelling, and does not comply with the fire safety regulations, meaning the building is dangerous under section 121(1)(b) of the Act.

1.4 The matter to be determined² is therefore the authority’s exercise of its powers of decision in issuing a dangerous building notice for the building.

1.5 Any issues relating to the Resource Management Act 1991 and proceedings in the Environment Court do not form part of the matter to be determined.

1.6 Jayashree Limited was the previous owner of the building. On 15 January 2013 the property was transferred to a separate registered company, Madhava Limited who is the applicant to this determination. The authority issued the first dangerous building notice to Jayashree Limited; however the authority later withdrew this and re-issued a second dangerous building notice (“the dangerous building notice”) to the applicant who was the owner of the property at the time both dangerous building notices were issued.

¹ The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.dbh.govt.nz or by contacting the Ministry on 0800 242 243.

² Under sections 177(1)(b) and 177(3)(f).

- 1.7 In making my decision, I have considered the submissions of the parties, and other evidence in this matter. The relevant sections of the Act and Building Code discussed in this determination are set out in Appendix A.
- 1.8 Unless otherwise stated, all references to sections are to sections of the Act and all references to clauses are to clauses of the Building Code (Building Regulations 1992, Schedule 1). I note this determination relates to the post-2012 Building Code in relation to fire, which came into effect in April 2013.

2. The building and background

- 2.1 The building is a two storey dwelling with a concrete block ground floor and a timber frame upper floor with timber weatherboard cladding. The building has a tiled hipped roof.
- 2.2 The floors are linked by a non-fire rated stairwell. From the information provided by the applicant in the building plans, dated October 2013 (refer Figure 1) there are six bedrooms, three separate gas meters, three separate electric meters, three separate continuous flow type gas heating units, and three stoves.

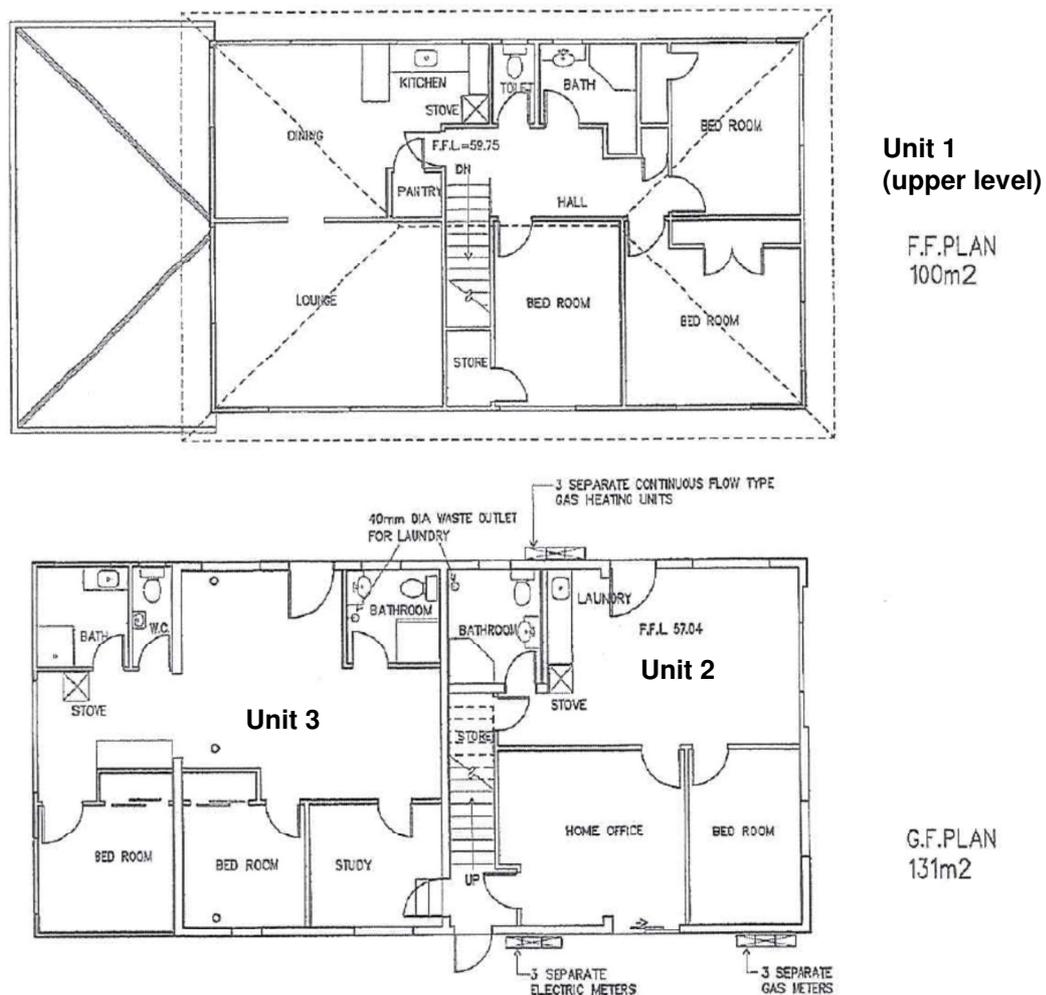


Figure 1: Floor Plan for the building (not to scale)

- 2.3 On 10 February 2012 the authority carried out a site inspection.
- 2.4 On 15 October 2013 the applicant submitted an application to the authority for a Certificate of Acceptance for two stoves on the ground floor of the building that had been installed in January 2011.
- 2.5 On the 17 October 2013 the authority and an appointee from the NZFS visited the building. The officers of the authority observed two units occupied and a third unit empty and up for rent. The officers spoke to the occupants who advised they did not have freedom of access throughout the building.
- 2.6 The following observations were noted by the NZFS in a report dated 17 October 2013:

- no evidence of separation between the two levels of the building
- the only fire egress from the upper level consisted of a non-fire rated stairwell
- a lack of adequate smoke alarm coverage in sleeping areas on both levels and only a single smoke alarm was located in the upper level hallway.

The NZFS concluded that the building was dangerous under section 121(1)(b) of the Act due to the lack of fire separation between the two separate tenancies used as self-contained sleeping residential occupancies and the lack of adequate early warning in sleeping areas to warn both levels in the event of a fire occurring in either level.

- 2.7 On 27 November 2013 the authority issued a dangerous building notice to Jayashree Limited. The authority considered the building dangerous due to:

the lack of fire separation between three residential units (same dwelling) but not limited to internal, external and vertical fire spread

The remedy on the notice stated:

the building is to be used as one dwelling unit as per the original consented plans.
One kitchen is to be removed

- 2.8 On 7 December 2013 the applicant issued a termination of tenancy notice providing three named tenants with 90 days' notice to vacate the premises by 7 March 2014.
- 2.9 The Ministry received an application for determination on 20 December 2013.
- 2.10 On 22 January 2014 the Ministry requested clarification from the parties regarding why the building contained separate meters for gas and electricity services, separate water heaters, and separate kitchen facilities as the applicant's submission stated that the building was occupied by tenants under a single tenancy.
- 2.11 On 31 January 2014 the applicant's lawyer responded, stating that the additional facilities are not indicative of the use of the building as a multi-unit dwelling, the building is currently occupied by tenants who reside together as a domestic household and have unrestricted access and use of all rooms and areas of the building.
- 2.12 On 20 February 2014 the authority wrote to the applicant and the Ministry stating that the first dangerous building notice dated 27 November 2013 had been withdrawn as it had been issued to the previous owner of the building. The authority had subsequently issued another dangerous building notice (which is the subject of this determination) to the applicant. This notice stated:

the building is considered dangerous and insanitary for the following reasons

- the lack of fire separation and emergency warning system between the three residential units within the building
- the lack of external fire separation between the unprotected windows to the lower and upper floor; and
- the lack of fire separation between lower units and the internal means of escape from the upper floor.

[the authority] requires that you undertake the following building work which [the authority] reasonably believes is necessary to reduce or remove the danger:

the building is to be reinstated to a single dwelling unit as per the consented plans: B/2010/4016.

2.13 On 7 March 2014 the authority emailed the Ministry regarding the dangerous building notice. The authority noted in the email:

- Officers of the authority inspected the property and obtained evidence to demonstrate that there were two separate households residing at the property. In addition, officers were advised that the third unit downstairs was currently available for rent.
- The building still has inadequate fire separation and is dangerous.

3. The initial submissions

3.1 The applicant's lawyer made an application for determination including a submission dated 18 December 2013 and a further submission dated 31 January 2014. The matters raised in both submissions are summarised below:

- The current tenants have been given ninety days' notice to vacate the premises under their periodic tenancies. When the current tenants vacate the premises, the building will be used under a single tenancy and conform to the definition of a 'household unit' under section 7 of the Act.
- A 'household unit' is defined as '[the building] must be occupied, or intended to be occupied, exclusively as the home or residence of not more than one household.' The applicant has taken appropriate steps to ensure that the use of the building is a single household, and will be occupied by tenants who will interrelate with each other as an organised family. There will be a single tenancy agreement and management plan which requires that the tenants share the building and reside together without any restrictions.
- As the building is a single household unit under the Act, it does not require fire separation walls and is not a danger to the safety of persons residing there under section 121(1) of the Act.
- The applicant has lodged an application for a Certificate of Acceptance in relation to the additional stoves and kitchens.
- The district plan rules do not include any restrictions on the number of kitchens or stoves in a residential building.

3.2 The application included copies of:

- the two dangerous building notices issued by the authority
- the Certificate of Title
- the consented plans
- the application for certificate of acceptance
- the notice to the tenants to vacate.

3.3 The applicant's lawyer made a further submission dated 8 April 2014, in summary:

- There is an omission in the dangerous building notice; the requirement to remove a kitchen from the dwelling, which was required under the former notice.
- The applicant and the authority agreed that the kitchen and stove in the basement of the building can remain provided this area is not used as a separate household unit.
- The applicant has lodged an application for resource consent to establish two residential units within the building and has lodged an application to include the additional kitchen stoves under a variation of the current building consent
- The applicant has taken steps to reinstate the building to a single dwelling. The initial submissions dated 18 December 2013 and 31 January 2014 are still relevant.

4. The first draft determination and the further submissions

4.1 A draft determination was issued to the parties for comment on 25 June 2014. In summary the first draft determination concluded:

- The report from the NZFS provided to the authority under section 121(2)(b) lacked further analysis on the dangerous building test, and given the importance of such a notice more information and analysis would have been useful to assist the authority.
- There was conflicting evidence as to the number of occupants and tenancies in place at the building at the time the dangerous building notice was issued.
- In relation to the dangerous building notice, relevant factors to determine whether a building is dangerous include; occupancy and vulnerability of occupants, warning systems and escape routes to exit the building.
- In relation to occupancy, the first draft determination noted the building plans show 6 bedrooms and the level of social cohesion, if any, is unknown. The draft determination concluded the single smoke alarm located in the upper level hallway of the building would fail to provide adequate warning to the occupants, therefore increasing the likelihood of injury or death to the occupants in the event of a fire.
- The draft determination also noted the occupants may be able to reach the roof of the lower garage through a window to escape, if the height and size of the window is verified. It was noted many homes in New Zealand that are two storeys have limited access of escape from the second storey.

- The draft determination concluded the threshold for a dangerous building must be higher than a standard residential building that is not dangerous, and in this case it was not likely that injury or death to persons would occur. The draft determination also commented on the apparent change of use³ to the building.

4.2 The NZFS made a written submission dated 25 July 2014 through their legal advisers. In summary the NZFS submitted:

- The first draft determination failed to draw a conclusion on the nature of the occupancy of the building; it appeared to treat the building as if it were a single household unit, despite later concluding that it was a multi-unit dwelling.
- The draft failed to consider the fire safety requirements for the building that are critical to whether the building is dangerous.
- The criticism regarding the advice the NZFS provided to the authority is unwarranted and should be removed. Had the authority required further information or analysis prior to issuing the dangerous building notice, it could have been sought.
- Despite the amendment to section 121 of the Act, fire hazard and occupancy of the building are still relevant considerations to the overall assessment when determining whether a building is dangerous or not.
- The building was being used as a multi-unit dwelling with more than one residential tenancy in place at the time the dangerous building notice was issued. The draft determination concluded there was conflicting evidence regarding occupancy, however when determining if the building had undergone a change of use the draft determination concluded it was a multi-unit dwelling. This is inconsistent.
- There was insufficient consideration to the provision of three separate kitchen areas within the building as sources of fire. The risk of a kitchen fire within the building is significantly higher than a typical residential house.
- There was a lack of adequate fire separation (and thus smoke separation) in the building; this will allow smoke and fire to travel rapidly and compromise the occupant's escape routes.
- The NZFS agreed the use of only a single smoke alarm increased the likelihood of injury or death to the occupants in the event of a fire; however insufficient weight has been given to this factor. A multi-unit dwelling would normally require smoke detectors in each of the units.
- The means of escape from the building are inadequate given its use as a multi-unit dwelling. It is inappropriate given the lack of evidence to rely on the upstairs window as a possible means of escape.
- The combination of the above factors renders injury or death likely to occur in the event of a fire in the building. This is consistent with Determination 2014/026⁴.

³ "Change of use" has the meaning under section 5 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005.

⁴ Determination 2014/026 Regarding which fire risk group should be used in determining the compliance of proposed accommodation (*Ministry of Business, Innovation and Employment*) 21 May 2014

- 4.3 The authority provided a written submission dated 25 July 2014 and a further submission dated 30 July 2014 supporting the NZFS submission. In summary:
- A multi-unit dwelling is required to have a fire design plan. The two tenants had exclusive use areas and were restricted from entering each other's areas, which shows the social cohesion between the two groups was separate.
 - Smoke detectors are required in each unit for a multi-unit dwelling.
 - The finding in the first draft determination that the occupants may be able to reach the roof of the lower garage through a window was not verified by taking into account the height and size of the window.
 - In the context of the new Acceptable Solutions the building falls into SM⁵ risk group. This is 'based on the appearance of 3 separate units, identified by 3 water heaters, meters and a common stair'.
 - The units should be considered as independent units; not part of a larger single residence.
 - The authority outlined the requirements of a risk group SM building and concluded the building has some 'significant deficiencies at first sight if the spaces are considered as SM'.
- 4.4 The applicant provided a written submission through their lawyer on 8 July 2014, and a further submission dated 8 August 2014. In summary:
- The applicant disagreed that the building was in use as a multi-unit dwelling and disagreed that a change of use arose under section 114 of the Act when resource consent for two separate tenancies were lodged and when additional kitchens were installed.
 - The building is currently being used as a single household unit as defined under section 7 of the Act. It is exclusively occupied by one household. The inclusion of additional kitchens does not constitute any change to the sleeping activities of the occupants. Sections 114 and 115 of the Act will apply once the resource consent is granted.
 - The draft determination referred to a lack of evidence relating to a single tenancy agreement or management plan. The applicant confirmed the dwelling is currently occupied by tenants who reside there under a single tenancy and management plan. This is provided with the applicant's further submission. The tenancy agreement and management plan confirms the tenants must share facilities and not establish restrictions within the dwelling. This is similar to a group of people flatting together.
 - There was no change of use from SH to SR under the Change of Use Regulations⁶.

⁵ SM (Sleeping, non-institutional) Risk Group C/AS2 Acceptable Solutions. Risk groups are found in Table 1.1 of the Commentary for Acceptable Solutions C/AS1 to C/AS7. I note the Acceptable Solutions are based around the concept of different buildings, or parts of buildings, belonging to different risk groups. Risk groups are allocated depending on the activities that will occur within the building or part of the building.

⁶ Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005

5. The hearing and site visit

- 5.1 I arranged a hearing to be held in Auckland on 15 September 2014. The hearing was attended by the applicant and the applicant's lawyer, three officers of the authority including a legal adviser, and two officers of the NZFS and its legal adviser. I was accompanied by a Referee engaged by the Chief Executive under section 187(2) of the Act, together with an officer of the Ministry and a consultant fire safety engineer. The attendees visited and inspected the property as part of the hearing process.
- 5.2 All the attendees spoke at the hearing and substantial evidence was presented to me to clarify various matters of fact and was of assistance to me in preparing the determination. The evidence provided included:
- A brief of evidence from an officer of the NZFS and a synopsis of submissions from the NZFS.
 - A further submission from the authority, two statements of evidence from officers of the authority and a folder of exhibits.
 - A letter from the authority's technical leader (fire) providing guidance for the authority and referred to by the authority in the hearing.
- 5.3 There was discussion between the parties regarding occupancy and the use of the building, social cohesion, and the fire safety features in the building including means of escape, fire separation and warning systems.
- 5.4 The views put forward at the hearing, and evidential submissions provided at the hearing are summarised below.

5.5 Occupancy

- 5.5.1 The applicant's lawyer disputed the view that the building is a multi-unit dwelling, and disputed the findings in the draft determination that a change of use occurred from SH to SR. The building had always been SH and is currently in use as SH, there is freedom of movement within the building and the tenants live as an organised family with a management plan in place. The additional kitchens do not lead to the conclusion the building is a multi-unit dwelling.⁷
- 5.5.2 The authority contended at the time the dangerous building notice was issued there were three separate residential units in place. This is evidenced by a tenancy eviction notice given by the applicant. Two officers of the authority (present at the determination hearing) inspected the building on 17 February 2014 and found two tenancies in place; the third was empty and stated to be advertised. The doors between Units 2 and 3 (refer Figure 1) were locked and there was no access between the areas of the building.
- 5.5.3 The NZFS's legal adviser discussed the importance of the physical features of a building, and the social cohesion a building is capable of compared to tenancy and management agreements that are not able to be controlled or managed over time.⁸ The NZFS submit the building is providing, or capable of providing accommodation for occupants with little or no social cohesion. The concept of social cohesion was divided into six categories in the NZFS's written brief of evidence; the primary factors being social co-dependence and communal co-dependence. The NZFS sought

⁷ The applicant's lawyer made reference to *Wanaka Gym Limited v Queenstown-Lakes District Council* [2012] NZHC 284 regarding the definition of household

⁸ The NZFS made reference to Determination 2014/026 Regarding which fire risk group should be used in determining the compliance of proposed accommodation (*Ministry of Business, Innovation and Employment*) 21 May 2014

a conclusion in the determination regarding whether the building is a single household unit or a multi-household unit.

- 5.5.4 I sought clarification from the applicant as to whether the same tenants that were present on 17 February 2014 are present today. The applicant was not able to confirm this.

5.6 Means of escape from fire and warning systems

- 5.6.1 The NZFS's legal adviser submitted that the means of escape was through a single external door on the ground floor; the stairwell in the centre of the building is the exit route for the upper level. The worst case scenario would be if a fire started in the lower levels, failing to activate the single smoke detector at the head of the stairs until one or two doors had burnt through. The means of escape for the upper level would be compromised, particularly if the occupants are sleeping.
- 5.6.2 The draft determination had made reference to a window on the upper level being a possible means of escape if the size and height of the window are verified. The authority presented evidence (confirmed in photographs and the site visit) regarding the height of the window. I accept this is not an adequate means of escape and have subsequently removed the reference to the upstairs window.
- 5.6.3 The applicant's lawyer stated there are now smoke alarms installed in every bedroom; these are stand-alone detectors and not interconnected. It appears these were installed sometime after the 17 October 2013 and 17 February 2014 inspections by the authority. The NZFS submitted the warning systems were below what would be considered appropriate.

5.7 Fire separation

- 5.7.1 The authority referred to a letter from its technical leader for fire, which lists the requirements for a new building under SM risk group for a multi-unit dwelling. The authority believe the building would appear to have 'significant deficiencies' if it is considered SM.
- 5.7.2 The NZFS discussed the notion of 'awareness' in relation to the fire occurring and knowing what other members of the household are doing. The NZFS noted it is anticipated there would be a rapid spread of fire and inadequate time for occupants to escape.

6. The second draft determination and further submissions

- 6.1 The second draft determination concluded the building was not dangerous for the purposes of section 121 of the Act, in summary:
- The second draft concluded the building was in use as a multi-unit dwelling at the time the dangerous building notice was issued.
 - The second draft provided an analysis of the building with C/AS2, as risk group SM, concluding the building did not comply with C/AS2 at the time the dangerous building notice was issued.
 - The second draft conducted a comparative analysis of the building using C/AS1 as if it were risk group SH. The building would largely have complied with C/AS1 except for the failure to have more Type 1 domestic smoke alarms installed. The lack of social cohesion between the occupants was discussed;

however, I concluded in the second draft that this did not have sufficient weighting for the building to be considered dangerous.

- The second draft noted that section 183 of the Act (to suspend the authority's powers relating to the matters to be determined) only related to the issuing of the dangerous building notice, and other powers relating to the change of use of the building were still available to the authority.

6.2 The applicant's lawyer provided a further submission on the second draft determination. In summary:

- The second draft determination was not accepted. The applicant maintained the house is a single household unit and was in use as such at the time the dangerous building notice was issued.
- The building may not be a typical single household unit, however it is not untypical of a residential dwelling that is used as rental accommodation and occupied by tenants.
- The definition of 'multi-unit dwelling' under Clause A1 which applies to a building which contains more than one separate household or family. The second draft determination concluded the building can be used for separate units as the rooms can be locked and closed off. The applicant disputed the rooms could be locked and closed off.
- The second draft should have analysed whether the building complied with the Building Code as a single household unit. The comparative analysis showed the building 'essentially complied' with the particular requirements in the Code when the dangerous building notice was issued.
- In relation to social cohesion, the applicant maintained the residents interrelate with each other as a group or family unit and share domestic facilities in a manner similar to a flatting arrangement. The residents have sufficient awareness of the other residents in the building to be able to assist in the event of a fire.
- In relation to change of use, the second draft does not consider that the configuration of the building falls within the definition of a single household unit. It is therefore unnecessary to implement the procedures set out in sections 114 and 115 of the Act.

6.3 On 2 December 2014 the authority's legal adviser provided a written submission disagreeing with the second draft determination. The authority agreed with the NZFS submission (refer paragraph 6.4) in relation to the dangerous building threshold, the comparative analysis and the comments regarding recent events. Accordingly the authority considered, for the reasons provided by NZFS, its decision to issue the dangerous building notice should be confirmed.

6.4 On 5 December the NZFS provided a written submission through their legal advisers. In summary:

- The NZFS agreed with the second draft that at the time the dangerous building notice was issued the building was being operated as a multi-unit dwelling with three separate units.
- The NZFS agreed that the building did not comply with C/AS2 in relation to warning systems, a single escape route from the upstairs unit and a lack of fire separations between the units.

- The NZFS considered the decision of the authority to issue a dangerous building notice should be confirmed.

The dangerous building threshold

- The second draft discussed how in ‘some circumstances’ the source of ignition could be considered. It is unclear what ‘some circumstances’ refers to and the NZFS seek clarity around this statement. The NZFS submitted that despite the amendment to section 121(1)(b) fire hazard and occupancy are still relevant considerations to assessing whether a building is dangerous or not.
- In relation to the meaning of ‘likely’ as discussed in *Weldon Properties*⁹, the second draft referred to an ‘imminent source of danger’ in order to reach the threshold of ‘likely’. The NZFS considered this inconsistent with the case law which does not suggest there must be an imminent source of danger and sets the bar too high. All that is required is a ‘sufficient’ source of danger. The NZFS is of the view there was a sufficient source of danger for the applicant’s building at the time the dangerous building notice was issued.
- The NZFS submitted the building lacked many of the basic requirements for a SM-type building and the only protection for the occupants at the time was a single smoke alarm upstairs, assuming the battery was not flat.

The comparative analysis

- The NZFS disagreed with the comparative analysis undertaken in the second draft. The analysis overlooked the separate requirements for different risk groups. The way a building is used is a ‘fundamental plank’ as to which risk group a building falls into, and how stringent the solutions need to be to protect occupants. The second draft appeared to ‘largely disregard’ social cohesion.
- The analysis compared the building to a single family dwelling which is incorrect due to other household units being present, a greater number of people exposed to fire, and a lack of social cohesion between the units resulting in inadequate warning of a fire.
- A multi-unit dwelling has an increased probability and consequence of a fire, thus the Building Code requires a higher level of protection. A comparative analysis is invalid as it ignores the change in risk profile.
- The logical comparison is between the building as it exists against the Building Code requirements for the applicable purpose group. The NZFS consider the conclusion regarding the comparative analysis should be removed.

Recent events

- The NZFS was concerned with the precedent effect of this determination. There have been four major house fires in the past few weeks resulting in deaths and serious injuries. Rental accommodation poses a very real risk.
- Rental properties have a reduced social cohesion between occupants, the majority of fatal house fires happen in rental properties.

⁹ *Weldon Properties Ltd* [1996] DCR 635

7. The third draft determination and further submissions

- 7.1 In issuing a third draft determination I gave significant weighting to the submission of the NZFS on the second draft determination and took into account its comments where appropriate.
- 7.2 The third draft determination came to a different conclusion to the first and second drafts, namely that at the time the dangerous building notice was issued the building was dangerous for the purposes of section 121(1)(b) of the Act.
- 7.3 On 19 March 2015 the authority accepted the third draft determination without comment.
- 7.4 On 26 March 2015 the NZFS accepted the third draft determination noting substantive changes had been made to the conclusion.
- 7.5 On 26 March 2015 the applicant's lawyer responded, stating the third draft determination was not accepted and provided the following comments, in summary:
- The applicant disagreed with the decision as there is no 'reasonable basis' to conclude that injury or death to any persons in the building is likely in the event of a fire.
 - The applicant contended the building was in use as a single household unit at the time the dangerous building notice was issued and that the building is currently in use as a single household unit.
 - The building has four escape routes from the ground floor of the building. The absence of fire separation walls and doors is not relevant as it is a single household unit.
 - The applicant has purchased several smoke alarms installed within one metre distance from every bedroom and inside each bedroom, acting on advice from NZFS.
 - The presence of kitchen stoves/ovens in the building is unlikely to contribute to injury or death in the event of a fire. The applicant disagreed that the potential for fire to arise from this source has increased, due to the instalment of smoke alarms. The building currently contains two stoves, one on each floor not three.
- 7.6 I have taken account of the applicant's submission where appropriate. I note that the decision at paragraph 11.1 of this determination is a decision on the authority's exercise of powers at the time the dangerous building notice was issued. I understand aspects of the building may have changed, for example the addition of smoke alarms, however the current state of the building has not been analysed for the purposes of the decision under section 188 of the Act.

8. Discussion

8.1 The NZFS report

- 8.1.1 Section 121 sets out the meaning of a ‘dangerous building’, and section 121(2) states that for the purposes of determining whether a building is dangerous an authority ‘a) may seek advice from members of the NZFS...; and b) if the advice is sought, must have due regard to the advice.’
- 8.1.2 The authority conducted a site visit on 10 February 2012 and as a result sought the advice of the NZFS. In that respect I consider the authority correctly exercised its powers in terms of section 121(2)(a) by seeking advice from the NZFS.
- 8.1.3 The fire report provided detail on the construction of the building, photographs and commentary as to the lack of adequate smoke alarm coverage in the sleeping areas and the non-fire rated stairwell. I consider the authority has had due regard to this advice when issuing the dangerous building notice under section 121(2)(b) as reflected in the reasons provided on the dangerous building notice (refer paragraph 2.12).

8.2 The section 121(1)(b) test

- 8.2.1 The matter to be determined is whether the authority correctly exercised its powers in issuing a dangerous building notice under section 124 of the Act. The meaning of ‘dangerous’ is found under section 121 of the Act, which provides in the event of a fire, injury or death to any persons in the building or to persons on other property is likely.
- 8.2.2 The dangerous building notice issued by the authority on 20 March 2014 quoted section 121 of the Act as:
- In the event of fire, injury or death to any persons in the building or to persons on other property is likely because of fire hazard or the occupancy of the building
- 8.2.3 I note that section 121(1)(b) was amended by section 51 of the Building Amendment Act 2012 which came into force on 13 March 2012. The current section 121(1)(b) reads ‘in the event of fire, injury or death to any persons in the building or to persons on other property is likely’. The effect of this amendment is such that two aspects of the previous test, being occupancy and fire hazard, have been removed. In relation to fire hazard this is defined under section 2 of the Act (interpretation) as:
- fire hazard** means the danger of potential harm and degree of exposure arising from—
- (a) the start and spread of fire; and
- (b) the smoke and gases that are generated by the start and spread of fire
- 8.2.4 Fire hazard and occupancy were previously used in section 121(1)(b) to help dictate what it was about a building that made it dangerous. The removal of these two concepts following the amendment to the Act has widened the scope of what can be considered a dangerous building. Under the current legislation a building can be dangerous for any reason relating to fire (including fire hazard and occupancy). I consider the likely source of a fire and occupancy remain part of the amended definition.
- 8.2.5 There is always a risk that in the event of a fire death or injury to persons will occur, but there must be particular features of a building for this risk to be ‘likely’ to occur. The analysis for a dangerous building notice in relation to fire must first focus on whether the building complies with the Building Code. If this answer is in the

negative, then the next analysis will focus on what features of the building that do not comply with the Building Code make it dangerous for the purposes of section 121(1)(b). A building may be non-compliant with the Building Code but additional analysis of the particular configuration and features of the building will need to be undertaken to establish whether or not the non-compliance amounts to ‘dangerous’ so as to warrant the seriousness of a dangerous building notice.

8.2.6 The particular features of the building to analyse could include (but are not limited to):

- nature, number and location of ignition sources
- means of escape
- warning systems
- use of the building under the Change of Use Regulations
- occupancy.

8.2.7 I note that the phrase ‘in the event of fire’ infers a credible fire scenario. Not the worst credible fire scenario that one might assume if testing to full Building Code compliance but not a trivial fire scenario. The analysis should be aligned to a fire typical of the building’s type and occupancy.

8.3 The meaning of “likely”

8.3.1 I note the term “likely” was considered in Determination 2006/119¹⁰ in the context of the dangerous building test under section 64 of the former Building Act 1991. The relevant paragraph of that determination states :

5.2.1 The word “likely” in the context of section 64 of the Building Act 1991 (“the former Act”), now section 121, has been interpreted as follows: “likely” does not mean “probable”, as that puts the test too high. On the other hand, a mere possibility is not enough. What is required is “a reasonable consequence or [something which] could well happen”. *Auckland CC v Weldon Properties Ltd* 7/8/96, Judge Boshier, DC Auckland NP2627/95, [1996] DCR 635.

I take the view that this decision is good law in respect of the word ‘likely’ in section 121 in that ‘likely’ means something that could well happen.

8.4 The use of the building at the time the dangerous building notice was issued

8.4.1 The authority stated that there were three household units, two being occupied and a third available for rent at the time of its inspection of 17 February 2014. The applicant’s lawyer has submitted the building was and has always been used as a single house hold unit; the tenants had freedom of movement throughout the building.

8.4.2 The physical configuration of the building at the time the notice was issued included three kitchen stove areas, three bathrooms, three gas meters and three electric meters. In my view, and based on verbal evidence provided at the hearing, I believe the doors between the three units were able to be locked and therefore separated from each other at the time.

¹⁰ Determination 2006/119 Dangerous building notices for houses in Matata, Bay of Plenty (*Department of Building and Housing*) 7 December 2006

8.4.3 Under Clause A1 of the Building Code the following definitions are provided under Housing:

2.0.2 Detached Dwellings – applies to a building or use where a group of people live in a single household or family

2.0.3 Multi-unit dwelling – applies to a building or use which contains more than one separate household or family

Under Section 7 of the Act household unit is defined as:

- (a) Means a building or group of buildings, or part of a building or group of buildings, that is
 - (ii) occupied, or intended to be occupied, exclusively as the home or residence of not more than 1 household unit

8.4.4 In my view, based on the evidence provided to me, at the time the dangerous building notice was issued the building was being used as a multi-unit dwelling with three separate units (although only occupied by two). I do not consider the physical configuration of the building and the evidence given by the officers of the authority are typical of a single unit household, and therefore the following analysis will be based upon the building being a multi-unit dwelling.

8.5 Building Code compliance

8.5.1 To determine whether a building is dangerous or not, the first analysis should determine whether the building complies with the Building Code (current at the time the dangerous building is considered). The most direct way of doing this is to compare it to the Acceptable Solution notwithstanding that this is only one way of satisfying the Building Code.

8.5.2 The building was a multi-unit dwelling at the time the dangerous building notice was issued, and falls within the use group of SR (Sleeping Residential)¹¹. The relevant Acceptable Solution is C/AS2 which applies to risk group SM – sleeping (non-institutional). This Acceptable Solution is a standard for determining compliance with the Building Code clauses C1-C6 relating to protection from fire; however I note it is not the only means of showing compliance.

8.5.3 In reference to paragraph 2.2.10 of C/AS2 which states that:

For low-rise buildings that have no more than two levels (one household unit above another), and where each household unit has its own escape route that is independent of all other household units, and that contain only risk group SM, then the requirements of risk group SH shall apply (see C/AS1)

The escape routes in the dwelling were not independent; namely the escape route from the upstairs unit was also available to be used by the ground floor units. I also note the means of escape were not fire-rated. Therefore C/AS2 is the correct Acceptable Solution to use. I also note for the purposes of the following analysis, the occupant load for the building has been determined at 12 and the escape height is less than 10m.

8.5.4 The requirement for a Type 2 smoke alarm under paragraph 2.2.1 of C/AS2 does not apply in this case, as the escape routes served no more than 10 beds and the exit doors opened directly to a safe place. Type 1 domestic smoke alarms were required however.

¹¹ The 'use groups' are found in the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005. The use groups under the Regulations and the risk groups under the Acceptable Solution do not contain the same groups.

- 8.5.5 In relation to the warning system in the multi-unit dwelling, the evidence provided by the authority and NZFS indicate there was a single domestic smoke alarm located in the upper level hallway at the time the dangerous building notice was issued. In my view the warning system in the building was not compliant with the Building Code for a Type 1 system as per F7/AS1. (I note at the time of writing this determination the building has since had a number of additional domestic smoke alarms installed in the three units.)
- 8.5.6 In relation to escape routes, under paragraph 3.2 of C/AS2, a single compliant escape route from each unit is required. The ground floor had two escape routes: from the external door direct to the outside, and the internal door into the common stairwell then to the outside. The minimum height and width requirements for the ground floor escape routes appear to be adequate.
- 8.5.7 The upper level had only a single means of escape by way of the internal stairwell, and there were no compliant fire separations (fire walls, fire doors, fire rating to the underside of the stairs) that separated the stairwell from the adjacent spaces. There was no evidence of a smoke lobby provided at the ground floor level at either of the two ground floor units. I consider the single escape route from the upper level unit did not comply with paragraphs 3.2, 3.9.3 and 3.9.5 of C/AS2.
- 8.5.8 In relation to fire safety precautions, the requirements for C/AS2 state there must be fire separations between the units and the escape routes (fire walls, fire doors) and between each unit (fire walls, fire rated floor and ceiling systems). Paragraph 4.6.8 of C/AS2 states that every household unit shall be a single fire cell separated from every other fire cell by fire separations having a fire resistance rating (“FRR”) in accordance with paragraph 2.3 of C/AS2. There appeared to be no fire separations separating the upper level escape route from the adjacent ground floor, nor those separating the ground floor units from one another as would be required.
- 8.5.9 I have not assessed the external spread of fire as I do not consider it relevant in determining life safety for the purposes of the dangerous building notice considered in this determination.
- 8.5.10 In using C/AS2 as an evaluative tool, I conclude the building did not comply with the Building Code as a multi-unit dwelling at the time the dangerous building notice was issued.

8.6 Application of the section 121(1)(b) test

- 8.6.1 The second analysis that is undertaken is what particular features of the building (or lack of features) in combination result in the building being dangerous for the purposes of section 121(1)(b). This second analysis is undertaken in light of the establishment of non-compliance with the Building Code.

Nature, number and location of ignition sources

- 8.6.2 I accept the evidence that at the time the dangerous building notice was issued there were three ovens inside the building, although only two were in use (as only two units were occupied at that time).
- 8.6.3 I do not consider three ovens in a multi-unit dwelling consisting of three units to solely contribute to the building being dangerous under section 121(1)(b). It is accepted that each unit within a multi-unit dwelling would have separate kitchen areas with an oven.

Means of escape

- 8.6.4 The numbers of escape routes, the availability of the escape routes and the protection of the escape paths from the effects of fire, providing sufficient time to allow safe escape are all factors that should be taken into consideration in an analysis. There is no evidence provided as to the escape routes being adequately protected from the effects of fire (being heat, smoke or toxic products) at the time the dangerous building notice was issued, including:
- insufficient fire separation elements
 - no evidence of any fire rated walls around the stairway
 - no evidence of any inter-storey fire rated floor/ceiling systems
 - no evidence of any compliant fire rated doors leading from the ground floor unit into the stairway
 - no evidence of any fire rated separations below the stairway.
- 8.6.5 The evidence that the two doors from the ground units into the stairway were kept closed and locked is not accepted as adequate in terms of fire separation between the stairway and the adjacent ground floor units. A locked door is not a resilient fire safety feature: the probability that doors can be unlocked is high, and in this case a hollow-core door with no closer or seals does not provide adequate fire separation. I consider the absence of fire separation is detrimental and likely to contribute to injury or death in the event of a fire at the building (at the time the dangerous building notice was issued).

Warning systems

- 8.6.6 From the evidence provided, there was a single Type 1 domestic smoke alarm installed in the upper level hallway at the time the dangerous building notice was issued. There is no evidence to indicate whether the smoke alarm was in working order and I accept this fire safety feature is therefore not robust in that it can be easily removed or the battery fail to work.
- 8.6.7 I accept that the smoke alarm would not have provided adequate early warning of a fire in any of the ground floor spaces. I also consider there may not have been adequate sound penetration from the alarm to the sleeping occupants on the upper level. For compliance with C/AS2 paragraph 2.2, compliant Type 1 smoke alarms are required in each unit; however this is dependent on the provision of compliant fire separations and individual fire escape routes from each unit, neither of which were present in the building at the time the dangerous building notice was issued.
- 8.6.8 Although the presence of three kitchen stoves in each of the units does not in itself contribute to the building being dangerous, I consider that in conjunction with the lack of smoke alarms in each unit the potential for a fire to occur either upstairs or downstairs (as a kitchen stove was located on each floor) was increased in terms of the source of ignition; therefore the lack of smoke alarms in this scenario would contribute to injury or death in the event of a fire.

The use of the building

- 8.6.9 As discussed in paragraphs 8.4, I consider the building was in use as a multi-unit dwelling at the time the dangerous building notice was issued. There is assumed to be little or no social cohesion between the occupants of the units.

Occupancy

8.6.10 I do not consider the building had an occupancy level that contributed to the building being dangerous.

8.7 Conclusion

8.7.1 The threshold for a dangerous building under section 121(1)(b) must be higher than a mere possibility, it is a 'reasonable consequence' something could well happen. Using an analysis to the Acceptable Solution C/AS2 as the relevant compliance document, it is clear that the building did not comply with the Building Code at the time the dangerous building notice was issued. The Building Code is performance based, and I note C/AS2 is not the only way to prove compliance with the relevant clauses of the Code. In this case, I am of the view that the building's deficiencies in relation to C/AS2 are significant and such that they also translate to non-compliance with the performance requirements of the Building Code.

8.7.2 I consider in this case that, in combination with non-compliance with C/AS2, the features or absence of features of the building were such that they contributed to the likelihood of injury or death in the event of fire.

8.7.3 I note that a dangerous building notice has significant implications under section 124(2), the authority can do any or all of the following:

- (a) put up a hoarding or fence to prevent people from approaching the building nearer than is safe:
- (b) attach in a prominent place on, or adjacent to, the building a notice that warns people not to approach the building:
- (c) except in the case of an affected building, issue a notice that complies with section 125(1) requiring work to be carried out on the building to—
 - (i) reduce or remove the danger; or
 - (ii) prevent the building from remaining insanitary:
- (d) issue a notice that complies with section 125(1A) restricting entry to the building for particular purposes or restricting entry to particular persons or groups of persons.

8.7.4 These powers include preventing people from accessing a building or in the case of a residential building, could include evicting residents from their home. The seriousness of a dangerous building notice should be taken into account when the authority decides to issue such a notice. There may be alternative regulatory mechanisms that can be used to remedy a situation. In this case I consider the failure of the applicant to follow the correct procedure and advise the authority of a change of use has created the situation. I also consider the authority could have issued a notice to fix relating to the change of use to rectify non-compliance issues as an alternative regulatory mechanism.

9. Change of use

9.1 Having concluded that the building is dangerous under section 121(1)(b), I also note that if an owner is intending to change the use of a building section 114 of the Act requires the owner give written notice to the authority. To change the use of a building or part of a building means:

- to change from one categorised use (as per the 2005 Regulations table) to another categorised use; and

- that the new use has more onerous requirements than the old use for compliance with the Building Code, or has additional requirements for compliance.

9.2 The Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 (“the Regulations”) defines ‘change the use’ as:

In relation to a building means to change the use (determined in accordance with regulation 6) of all or a part of the building from one use (the old use) to another use (the new use) and with the result that the requirements for compliance with the building code in relation to the new use are additional to, or more onerous than, the requirements for compliance with the building code in relation to the old use.

9.3 I have considered the use of the building in terms of Schedule 2 of the Regulations, which categorise uses of buildings as uses related to:

- crowd activities
- sleeping activities
- working, business, or storage activities
- intermittent activities

9.4 In my view the building’s use was changed from SH (Sleeping Single Home) at the time it was consented, to SR (Sleeping Residential) at the time the dangerous building notice was issued. With any change of use the procedures under section 114 and 115 of the Act will apply.

9.5 I consider the building was in use as a multi-unit dwelling as there were two residential households residing at the premises at the time the notice was issued (with the third unit waiting for tenants). I do not agree that configuration of the building itself fell within the definition of a single household unit; nor do I consider that currently the building falls within the definition of a single household unit. The features of the building in terms of separate access to the units, lockable doors, separate kitchen and sanitary facilities, separate electrical and gas meters are such that it is cannot be considered a single house hold unit. The applicant has largely been relying on tenancy agreements and management practices in support of the view that it is a single household.

10. What happens next

10.1 The matter of how the building is to be brought to compliance with the Building Code to the extent required by the Act in relation to the change of use is for the owner to propose and for the authority to accept or reject. As noted at paragraph 8.5 the current state of the building is not the matter subject to determination; either of the parties is entitled to submit doubts or disputes in regards the current state of the building to the Ministry for a determination. I consider the parties should take into account the findings of this determination regarding fire safety at paragraphs 8.5 of this determination.

10.2 In the earlier draft determination I noted that section 183 of the Act states that until a final determination is made any decision or exercise of power by the authority that relates to the matter to be determined is suspended, and that this relates to the matter to be determined (refer paragraph 1.4) which in this case is the issue of the dangerous building notice and not the matters discussed in paragraph 9. The authority has stated it considers future enforcement action will depend on the findings in this determination.

11. The decision

11.1 In accordance with section 188 of the Building Act 2004, I consider that the authority correctly exercised its powers in issuing a dangerous building notice for the purposes of section 121(1)(b) in relation to fire safety and I confirm the decision made by the authority in issuing the dangerous building notice dated 27 November 2013.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 13 April 2015.

John Gardiner

Manager Determinations and Assurance

Appendix A: the Legislation

A.1 The relevant clauses of the Building Act 2004 include:

114 Owner must give notice of change of use, extension of life, or subdivision of buildings

- (1) In this section and section 115, change the use, in relation to a building, means to change the use of the building in a manner described in the regulations.
- (2) An owner of a building must give written notice to the territorial authority if the owner proposes—
 - (a) to change the use of a building;
 - ...

115 Code compliance requirements: change of use

An owner of a building must not change the use of the building,—

- (a) in a case where the change involves the incorporation in the building of 1 or more household units where household units did not exist before, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use, will comply, as nearly as is reasonably practicable, with the building code in all respects; and
- (b) in any other case, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use,—
 - (i) will comply, as nearly as is reasonably practicable, with every provision of the building code that relates to the following:
 - (A) means of escape from fire, protection of other property, sanitary facilities, structural performance, and fire-rating performance;
 - (B) access and facilities for people with disabilities (if this is a requirement under section 118); and
 - (ii) will,—
 - (A) if it complied with the other provisions of the building code immediately before the change of use, continue to comply with those provisions; or
 - (B) if it did not comply with the other provisions of the building code immediately before the change of use, continue to comply at least to the same extent as it did then comply.

121 Meaning of dangerous building

- (1) A building is dangerous for the purposes of this Act if,—
 - (b) in the event of fire, injury or death to any persons in the building or to persons on other property is likely.
- (2) For the purpose of determining whether a building is dangerous in terms of subsection (1)(b), a territorial authority—
 - (a) may seek advice from members of the New Zealand Fire Service who have been notified to the territorial authority by the Fire Service National Commander as being competent to give advice; and
 - (b) if the advice is sought, must have due regard to the advice.

124 Dangerous, affected, earthquake-prone, or insanitary buildings: powers of territorial authority

- (1) This section applies if a territorial authority is satisfied that a building in its district is a dangerous, affected, earthquake-prone, or insanitary building.
- (2) In a case to which this section applies, the territorial authority may do any or all of the following:
 - (c) except in the case of an affected building, issue a notice that complies with section 125(1) requiring work to be carried out on the building to—
 - (i) reduce or remove the danger; or
 - (ii) prevent the building from remaining insanitary:
 - (d) issue a notice that complies with section 125(1A) restricting entry to the building for particular purposes or restricting entry to particular persons or groups of persons.
- (3) This section does not limit the powers of a territorial authority.

...

183 Decision or exercise of power suspended until determination made

- (1) Until the chief executive makes a determination on a matter, any decision or exercise of a power by any person referred to in section 177 that relates to that matter is suspended unless and to the extent that the chief executive directs otherwise.

...

A.2 The relevant paragraphs of C/AS2

3.2.1 Except where Paragraph 3.13 allows the use of single *escape routes*, every *occupied space* in a *building* shall be served by two or more *escape routes*

3.9.3 Entrances to vertical *safe paths* shall be preceded by *smoke lobbies* (refer to Paragraph 3.9.2 for the required area of the *smoke lobby*) except where:

- a) The *safe path* from an upper floor or *intermediate floor* serves only that floor, or
- b) The *firecell* is sprinklered, or
- c) The *occupant load* of the *firecell* is less than 150, or
- d) The vertical *safe path* is preceded by a horizontal *safe path*.

3.9.5 *Safe paths* shall be separated from each other, and from all spaces by:

- a) *Fire separations*, or
- b) If they are external to the *building*, by distance or appropriate *construction* (see Paragraph 3.11).

4.6.8 Every *household unit* shall be a single *firecell* separated from every other *firecell* by *fire separations* having an *FRR* in accordance with Paragraph 2.3.

A.3 The relevant paragraphs of C/AS1

3.2 Number of escape routes

Risk group SH may be served by a single *escape route* provided the permitted *dead end open path* distance specified in Paragraph 3.4 is not exceeded.

4.1 Fire separations

Each *household unit*, including any garage and *escape routes* in *multi-unit dwellings*, shall be *fire separated* from other *household units* and any *escape routes* with *fire separations* having an *FRR* of no less than 30/30/30.